86 1673

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER GREGORY,
Petitioner,

v.

THOMAS J. DRURY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether claim preclusive effect must be given to a prior state court judgment under 28 U.S.C. § 1738, thereby barring a subsequent federal action under 42 U.S.C. § 1983, where the procurement and entry of the judgment itself are essential elements of the § 1983 claim alleging violations of the Due Process Clause of the United States Constitution.

2. Whether the United States Fifth Circuit Court of Appeals erred by giving claim preclusive effect to a prior state court judgment under 28 U.S.C. §1738, where the state court proceedings were devoid of quality, effectiveness and fairness and the Petitioner was not afforded a full or fair opportunity to litigate his claims in the state court.

3. Whether there is a split between the United States Fifth Circuit Court of Appeals and the United States Tenth and Seventh Circuit Courts of Appeals in their respective applications of claim preclusion and of 28 U.S.C. § 1738 to subsequent actions brought under 42 U.S.C. § 1983 which warrants resolution by this Court.

PARTIES IN THE COURT OF APPEALS

The parties in the Fifth Circuit Court of Appeals were the Petitioner, Christopher Gregory, and the respondents, Thomas J. Drury, Bruno R. Goldapp, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth Oden, Mark White as Attorney General of the State of Texas, and The Alice National Bank.

Pursuant to Petitioner's Motion for Leave to File a Second Amended Complaint, which was never acted on by the United States District Court for the Southern District of Texas, Petitioner sought to update his Amended Complaint by naming as defendants the then current members of the John G. and Marie Stella Kenedy Memorial Foundation, Rene H. Gracida, Lee H. Lytton, Jr., E. B. Groner, Daniel Meaney and Sister Bernard Marie Borgmeyer, by substituting the then current Attorney General of the State of Texas, Jim Mattox, and retaining The Alice National Bank, Kenneth Oden and Thomas J. Drury as defendants.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Christopher Gregory petitions that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 27, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered on January 27, 1987, is not yet officially reported and is reprinted in Appendix A.[1]

The unreported judgment of the United States District Court for the Southern District of Texas, entered on

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[1] The Appendices will be cited herein as, for example, "App. G-1a". The letter designates the particular Appendix and the number refers to the particular page(s) of the Appendices.

January 24, 1986, was without opinion and is reprinted in Appendix B.

This Court's denial of a petition for writ of *certiorari* from a judgment of the Supreme Court of Texas in the prior state court action is reported at 452 U.S. 939 (1981). The judgment of the Court of Civil Appeals of Texas in the prior state court action is reported at 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, *writ ref. n.r.e.*), and is reprinted in Appendix C. The final judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on November 28, 1979, was unreported and is reprinted in Appendix D. The interlocutory judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on September 1, 1964, was unreported and is reprinted in Appendix E.

A related opinion of the Texas Court of Civil Appeals rendered on November 1, 1967, is reported at 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, *writ ref. n.r.e.*), and is reprinted in Appendix F.

The Petitioner's Amended Complaint is reprinted in Appendix G.

The affidavit of Reverend José Aldunate Lyon, submitted by Petitioner in opposition to the motions to dismiss in the United States District Court for the Southern District of Texas is reprinted in Appendix H. The affidavits of Marshall Boykin, III, and William R. Joyce, Jr., submitted by Petitioner in opposition to the motions to dismiss are reprinted in Appendices I and J, respectively.

JURISDICTION

This Court has jurisdiction to review the final decision of the Fifth Circuit Court of Appeals entered on January 27, 1987 under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution, the relevant portions of which are reprinted in Appendix K.

The statutes principally involved in the decision of the Fifth Circuit Court of Appeals are 42 U.S.C. § 1983 and 28 U.S.C. § 1783, the relevant portions of which are reprinted in Appendix L.

Rule 216 of the Texas Rules of Civil Procedure is reprinted in Appendix M.

STATEMENT OF THE CASE[2]

Preliminary Statement

Congress enacted 42 U.S.C. § 1983 "to interpose the federal courts between the States and the people, as guardians of the people's federal rights, to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or *judicial.*'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (emphasis added) (quoting from *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)). It would therefore be anomalous and emasculate the very purposes of § 1983 if depriva-

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[2] The allegations of Gregory's Amended Complaint (App. G-65a-76a) are assumed as true, and all inferences drawn in his favor, because the Fifth Circuit Court of Appeals affirmed the Southern District of Texas' dismissal pursuant to Fed. R. Civ. P. 12(b). *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1986). Moreover, the truth of Gregory's allegations (however remarkable they may seem at first blush) is substantiated in a number of investigative reports published both in the *Wall Street Journal* and in the *National Catholic Reporter*. *Wall St. Journal*, Oct. 8, 1986, p. 1, col. 1; Oct. 9, 1986, p. 1, col. 1. *National Catholic Reporter*, Feb. 6, 1987, Vol. 23, No. 15, p. 1, col. 1; Feb. 13, 1987, Vol. 23, No. 16, p. 7, col. 1; Feb. 20, 1987, Vol. 23, No. 18, p. 7, col. 1.

tions of fundamental Constitutional rights were insulated from challenge in the federal courts merely because the deprivation is accomplished in part by obtaining a state court judgment subject to the full, faith and credit statute, 28 U.S.C. § 1738. Yet, that is precisely what happened in this case.

The Petitioner, Christopher Gregory ("Gregory"), was denied a trial on the merits and a full or fair opportunity to litigate his claims in the prior state court action. The respondents deprived Gregory of his Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution by causing the Texas courts to enter an invalid settlement agreement as a court-ordered consent judgment binding on Gregory, notwithstanding Gregory's lack of consent and vehement objections to the alleged settlement. Once the respondents procured that judgment wrongfully, Texas law precluded Gregory from challenging its validity. Thus, Gregory turned to the federal courts seeking remedies under § 1983 for the deprivations of his Constitutional rights caused by the respondents' unlawful actions.

The United States District Court for the Southern District of Texas and the United States Fifth Circuit Court of Appeals, however, abdicated their role as guardians of federal rights by boot-strapping the very judgment which in part caused the Constitutional deprivation into an absolute bar to Gregory's federal claims under 28 U.S.C. § 1738. By its decision, the Fifth Circuit Court of Appeals sent a clear message to those, like respondents, bent upon abrogating the Constitutional rights of others —obtain a state court's imprimatur by whatever means and the deprivation of Constitutional rights will never thereafter be subject to challenge in the federal courts. Neither 28 U.S.C. § 1738, nor equitable state doctrines of claim preclusion, mandate such a patently unfair and perverse result.

The Prior Texas State Court Proceedings

Although the prior Texas suit was based on allegations of undue influence against Gregory, in reality it involved a fight for control of the John G. and Marie Stella Kenedy Memorial Foundation ("the Foundation").

The Foundation was established on January 22, 1960, by a wealthy and deeply religious South Texas widow, Sarita Kenedy East, for the purpose of assisting the poor and underprivileged primarily in South America. Sarita East simultaneously executed a new will leaving the residue of her estate to the Foundation. She also named herself as the Foundation's sole member and director.

In February, 1960, Mrs. East was advised by her local attorney, Jacob Floyd ("Floyd"), that she should appoint additional members to the Foundation. Consequently, she appointed Floyd and one of her relatives and a Texas District Court Judge, respondent, Lee H. Lytton, Jr. ("Lytton"). However, Mrs. East discovered shortly thereafter that Floyd's advice was erroneous. She therefore requested, and obtained, the voluntary resignations of Floyd and Lytton on June 16, 1960.

On December 30, 1960, Sarita East executed a third codicil to her 1960 will, appointing Gregory her successor as the Foundation's sole member and director upon her death. As a member of the Order of Cistercians of the Strict Observance, also known as the Trappists, Gregory had become acquainted with Sarita East some thirteen (13) years previously and had worked closely with her establishing Trappist monasteries in North and South America. It was because of one such South American trip with Gregory that Sarita East decided to form the Foundation and dedicate its resources to the poor in South America.

Sarita East died on February 11, 1961 and her will was admitted to probate on March 11, 1961. Gregory

thus became the Foundation's sole member and director, a situation which the respondents found intolerable.

On April 19, 1961, at the urging of the Bishop of Corpus Christi, Lytton, represented by and later joined by Floyd, commenced an action in the 79th Judicial District Court of Jim Wells County, Texas, seeking removal of Gregory from the Foundation based on the false allegation that Gregory had procured the prior resignations of Lytton and Floyd by unduly influencing Sarita East. Judge Lytton also obtained *ex parte* an injunction restraining Gregory from exercising any control over the Foundation. Lytton, however, never intended to prosecute the case; it was simply the mechanism to force Gregory's resignation and to replace him with Lytton and Floyd.[3] The Bishop of Corpus Christi and others intervened, each claiming an interest in the Foundation or its funds.

The undue influence allegations of Judge Lytton's lawsuit, however, unexpectedly jeopardized the Foundation's very existence. In 1962, based on those same undue influence allegations, remote heirs of Sarita East commenced actions in the Nueces County District Court, Texas, seeking to invalidate her 1960 will and prevent the residue of her estate from passing to the Foundation. By defending the 1960 will and the Foundation against the heirs' challenges, the respondents were placed in the difficult legal quandry of simultaneously asserting diametrically opposed positions in two different Texas courts. Their solution was to quietly settle Judge Lytton's suit lest it prove the instrument destroying the Foundation, while simultaneously assuming control of the Foundation by ousting Gregory.

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[3] Judge Lytton recently admitted to the *Wall Street Journal* that the true purpose behind his lawsuit was to ensure that the Foundation funds stayed in Texas under the control of Texans. *Wall Street Journal*, Oct. 8, 1986, p. 30, col. 2.

The respondents thus prepared for Gregory's signature a purported "settlement agreement" in the form of a consent judgment, his resignation from the Foundation and a naked power of attorney. The documents, however, presented no settlement because they required Gregory's complete abdication from the Foundation. Moreover, the alleged settlement agreement abrogated the will of Sarita East by requiring Foundation grants to be made within the State of Texas instead of to the poor in South America (App. E-43a), a requirement imposed to satisfy the Texas Attorney General.[4] Gregory refused to sign the documents.

Unable to obtain Gregory's signature through their own devices, the respondents used Gregory's religious status and enlisted the aid of his religious superiors to coerce him into accepting their proposed "settlement". Gregory was sent to a monastery in Chile and ordered to sign the documents under repeated threats of dismissal from the Trappists and excommunication from the Catholic Church if he refused. Formal canonical warnings were threatened; at least one issued. In September, 1963, under extreme duress and torn between his duties of conscience to Mrs. East and obedience to his superiors, Gregory, on the advice of a distinguished Catholic prelate, signed the settlement agreement conditionally, but refused to execute the resignation or power of attorney. (App. H-77a-78a). The conditional nature of Gregory's signature was set forth in his cover letter addressed to the Holy See in which he reconciled his two conflicting religious duties (conscience versus obedience) by conditioning his assent on the Holy See taking full responsibility in writing for changing the will of Sarita East. (*Id.*).

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[4] The Texas Attorney General was made a party because the Foundation was a charitable organization established under the Texas Non-Profit Corporation Act. (App. E-31a).

The signed settlement agreement and Gregory's cover letter never reached the Holy See. They were intercepted by the Apostolic Visitator appointed by the Catholic Church to settle Judge Lytton's suit. He removed the cover letter and sent what thus appeared to be an unconditionally signed settlement agreement to the respondents in Texas. These actions were kept secret from Gregory and his counsel.[5]

By October, 1963, all other parties to the Lytton suit, including the Texas Attorney General, had signed the settlement agreement. However, the Foundation's Articles of Incorporation had to be amended to make the settlement effective. That action, in turn, required Gregory's assent because he had never resigned from the Foundation. In January, 1964, Gregory was summoned to a meeting in Miami, Florida attended by Floyd's law partner, Kenneth Oden ("Oden"), and Texas attorney Robert Jewett ("Jewett"), who represented various parties in the Lytton suit. There, Gregory was ordered to resign from the Foundation and execute a naked power of attorney. Gregory again refused, orally revoked his prior conditional assent to the settlement and forbade Jewett from representing his interests in any way in the Lytton litigation.

In reprisal, Gregory was sent to a monastery in the remote regions of Northern Canada and placed under virtual house arrest. He was forbidden from speaking with anyone about the Foundation or the litigation, including his counsel, under threat of excommunication *ipso facto*.[6]

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[5] Gregory had retained his own lawyer, William R. Joyce, Esq., of Washington, D.C., in November, 1961. (App. J-87a).

[6] The clear and unequivocal threat came from Gregory's Abbot in a July, 1964 letter (emphasis added):

> I therefore want to make it perfectly clear to you that I would consider, as a serious violation of your precept, communicating

Unable to coerce Gregory's resignation or power of attorney, the respondents turned to Gregory's Abbot, Dom Thomas Keating ("Keating"). On August 31, 1964, they extracted from Keating an unsigned, unverified telegram purporting to authorize Jewett (not Gregory's attorney) to take all actions necessary in Gregory's behalf to finalize the settlement.

Armed with Keating's telegram, and purporting to use it as Gregory's "proxy", on September 1, 1964, Jewett (1) convened a special meeting of the Foundation; (2) amended the Foundation's Articles of Incorporation; (3) elected Lytton, the Bishop of Corpus Christi, Oden, and others (all local Texans) as the Foundation's new members; and (4) tendered Gregory's resignation. (App. J-91a-97a).[7]

That same day, Jewett presented the settlement agreement to the Jim Wells County District Court as *fait accompli*, misrepresented that all parties had agreed to it and requested its entry as a judgment of the court. The Texas District Court incorporated the settlement

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with anyone regarding the KMF [*i.e.* the Foundation] without my written permission. Any absence for the sake of the KMF, without permission, would bring with it *another canonical warning* and *excommunication* as a fugitive *ipso facto*.

[7] This meeting was a charade and a farce. Jewett, purporting to act as Gregory's "attorney-in-fact", was at the meeting. The Bishop, Lytton, Oden, Bruno Goldapp and Elena Kenedy also were present, although none was a member of the Foundation. Jewett conveniently avoided the obstacle of having to give Gregory the required notice by purporting to waive notice on Gregory's behalf. Jewett, acting for Gregory, then elected the Bishop, Lytton, Oden and the others as the Foundation's new members. The amendments to the Foundation's Articles of Incorporation were approved. Jewett also tendered Gregory's resignation. Thus, by using Keating's telegram, Jewett and the respondents were able to oust Gregory, settle the Lytton suit, alter the will of Mrs. East and gain control of the Foundation; all contrary to Gregory's wishes and without notice to Gregory or his counsel. (App. J-91a-97a).

agreement verbatim into a judgment, but made the judgment interlocutory pending the outcome of the ongoing will contest in Nueces County. (App. E-31a-54a). The respondents intentionally concealed from the court Gregory's objections and lack of consent before the settlement agreement was entered as a court-ordered interlocutory judgment. Unbeknownst to Gregory at the time, once the respondents slipped the settlement agreement past the Texas District Court and obtained the judgment, Gregory would thereafter be denied any procedural or substantive remedy under Texas law.

In March, 1966, after Gregory independently learned of the interlocutory judgment, he brought a separate action by way of Bill of Review in the Texas District Court challenging the judgment as invalid. However, the Bill of Review was dismissed as premature because, under Texas law, the interlocutory judgment was not subject to review. *Gregory v. Lytton*, 422 S.W.2d 586 (Tex. Civ. App.—San Antonio 1967, *writ ref. n.r.e.*). (App. F).

The interlocutory judgment and the Foundation lay dormant for approximately twelve (12) years while the respondents defended the will contest. On July 24, 1978, after Sarita East's 1960 will finally was upheld, the Texas Attorney General filed a motion seeking to convert the interlocutory judgment into a final judgment without a trial. Gregory responded by filing an amended motion to set aside the interlocutory judgment and timely requested a trial by jury.[8] A hearing ultimately was scheduled for September 21, 1979. (App. I-79a-80a).

Because a trial by jury was properly requested, Gregory and his counsel were taken by complete surprise when the

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[8] The Texas Rules of Civil Procedure provide that a trial by jury may be requested at any time up to ten (10) days before the date set for trial. Tex. R. Civ. P. 216. (App. M-106a). No trial date having been set by the District Court, Gregory's request for a trial by jury was timely under Texas law.

respondents appeared with witnesses and documents and began introducing evidence at the hearing. (App. I-80a). During the very short hearing (only a total of 94 pages of transcript), Gregory's repeated objections to the District Court receiving evidence on the substantive issues were routinely denied. (*Id.* ¶ 5). Faced with no alternative, and totally unprepared, Gregory was the only witness to testify on his behalf. (*Id.*).[9] The interlocutory judgment was converted into a final judgment on November 28, 1979. (App. D-21a-30a).

Although the record developed by the respondents in the Texas District Court was limited and one-sided, Gregory appealed to the Texas Court of Civil Appeals. Relying on the well-established rule in *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951), Gregory argued that the final judgment should not have entered and no evidence on the substantive issues should have been admitted because he had previously notified the court of his lack of consent and had properly requested a trial.[10]

The Texas Court of Civil Appeals, however, avoided Gregory's arguments by *sua sponte* making new law and retroactively applying the new rule to Gregory's case. *Gregory v. White*, 604 S.W.2d 402 (Tex. Civ. App.—San Antonio 1980, *writ ref. n.r.e.*), *cert. denied*, 452 U.S. 439 (1981). (App. C-15a-20a). The appellate court

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[9] Had Gregory been afforded the opportunity to present his case, he could have called numerous witnesses and introduced voluminous documents exposing the respondents' scheme, as described in the *Wall Street Journal* and *National Catholic Reporter* articles. *See* p. 3, *supra*, at n.2.

[10] In *Burnaman*, the Texas Supreme Court held that a valid consent judgment cannot be rendered if one of the parties withdraws his consent any time prior to entry of judgment and, if requested, a trial must be held on the validity of the objecting party's consent. *Id.*; 150 Tex. at 339, 240 S.W.2d at 291. *See Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984) (*Bernaman* rule requires continued consent of all parties at the moment judgment enters).

shifted the timing of *Burnaman*'s application, holding that its requirements must be satisfied before entry of an interlocutory consent judgment and were inapplicable after entry of an interlocutory judgment but before conversion into a final judgment. *Id.* at 403-404. (App. C-17a). This new rule of Texas law, announced and applied for the first time at the appellate level, thus placed Gregory into the jaws of a legal "Catch 22" and deprived him of any remedies under Texas law because, after the respondents caused the Texas District Court to incorporate the invalid settlement agreement into the interlocutory judgment in 1964, any subsequent challenge was either too early, *Gregory v. Lytton*, *supra*, 422 S.W.2d 586 (App. F-55a-64a), or too late, *Gregory v. White*, *supra*, 604 S.W.2d 402 (App. C-15a-20a).[11] Gregory's arguments that entry of the final judgment in 1979 without a trial contravened *Burnaman* and thus violated Due Process were ignored by the majority of the Texas appellate court. *See id.*, 604 S.W.2d at 404-405 (Cadena, Chief Justice, dissenting) (App. C-19a-20a).

On November 26, 1980, the Texas Supreme Court refused Gregory's petition for a writ of error, thereby making final and binding the invalid settlement agreement ousting Gregory from the Foundation. On June 15, 1981, this Court denied Gregory's petition for a writ of *certiorari*. 452 U.S. 939 (1981).

The Federal Lawsuit

On September 21, 1981, Gregory filed this action in the Texas Federal District Court[12] alleging, *inter alia*, that the respondents conspired under color of state law

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[11] It was of course impossible for Gregory to voice his objections before entry of the interlocutory judgment because the respondents intentionally prevented Gregory and his counsel from being present at the 1964 hearing for that very reason.

[12] The case initially was filed in the Western District of Texas, but was transferred to the Southern District of Texas on respondents' motion.

to deprive Gregory of his Due Process rights in violation of 42 U.S.C. § 1983. (App. G-65a-76a). In contrast to Gregory's appellate arguments in the Texas courts that he was deprived of his rights under *Burnaman* before entry of final judgment in 1979, Gregory's federal complaint focused on the respondents' unlawful actions before and at the time the 1964 interlocutory judgment entered. (App. G-67a-71a). Those actions, in combination with the retroactive application of the new Texas law announced at the appellate level in *Gregory v. White, supra* (App. C-15a-20a), deprived Gregory of his federally protected rights to a meaningful opportunity to be heard in violation of the Due Process Clause and 42 U.S.C. § 1983.

The respondents moved to dismiss under Fed. R. Civ. P. 12(b), raising the affirmative defense that the prior Texas judgment precluded Gregory's federal suit as a matter of law. Approximately four (4) years after the complaint was filed, and without the benefit of any discovery (it having been stayed from the outset upon respondents' motion), the District Court held an informal conference in chambers on January 9, 1986, at the conclusion of which the motions to dismiss were summarily granted without opinion. A formal judgment prepared by the respondents dismissing the case was entered by the District Court on January 24, 1985. (App. B-12a-14a).

On appeal, the Fifth Circuit affirmed the District Court's dismissal on the ground of claim preclusion. (App. A-1a-11a). The Fifth Circuit held that it was prevented by the full, faith and credit statute from considering whether Gregory was deprived of a full or fair opportunity to be heard, "regardless of our view of . . . its constitutional sufficiency [*i.e.*, the 1979 hearing]" (App. A-8a), apparently because "[n]othing suggest[ed] that the *appellate review* of the rejection of Brother Leo's motion to set aside was constitutionally suspect, whether or not one agrees with the rulings." (App. A-11a) (emphasis added).

The Fifth Circuit did not explain how further appellate review in the Texas Supreme Court after Texas law was changed and retroactively applied in *Gregory v. White* afforded Gregory the Due Process required under the United States Constitution. Nor did the Fifth Circuit consider whether Gregory's federal claims arose after and as result of the entry of the Texas judgment, thereby rendering claim preclusion inapplicable because the procurement and entry of the judgment itself were essential elements of Gregory's § 1983 claim. The Fifth Circuit also did not look behind the prior judgment to examine the quality, effectiveness or fairnes of the state court proceedings or determine whether Gregory had a full and fair opportunity to litigate his claims before judgment entered in state court. The Fifth Circuit brushed aside all such considerations stating, incorrectly: "We do not here face the issue of the preclusive effect under state law of a state court judgment flawed by a systemic failure of constitutional dimensions." (App. A-11a).

This case, however, presents precisely the issue of whether a state court judgment flawed by systemic failures of Constitutional dimensions must be given claim preclusive effect under 28 U.S.C. § 1738. The Due Process Clause of the United States Constitution requires that Gregory be afforded at least *one* full and fair opportunity to litigate his claims. To date, he has never had his day in any court; state or federal. Under these unique circumstances, neither 28 U.S.C. § 1738 nor the equitable doctrine of preclusion bar Gregory from asserting later-arising federal claims and seeking vindication of his Constitutional rights in the federal courts under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted Because This Case Presents An Important Legal Issue of First Impression

This Court has never decided whether a prior state court judgment which is an essential element of a litigant's § 1983 claim must be given claim preclusive effect under 28 U.S.C. § 1738. However, in *Tower v. Glover*, 467 U.S. 914 (1984) this Court suggested that claim preclusion does not apply (but issue preclusion may) where the Constitutional deprivation is accomplished, at least in part, through the wrongful procurement of a state court judgment.

In *Tower*, the petitioner filed a § 1983 suit alleging that his prior state court conviction had been procured pursuant to conspiracy between his attorneys and various state officials. After holding public defenders not absolutely immune from § 1983 liability, this Court remanded the case for consideration only of whether issue preclusion may be applicable. *Id.* at 923-924. The doctrine of claim preclusion was never considered or mentioned in the opinion, nor was the petitioner's complaint summarily dismissed. The *Tower* decision thus suggests that where, as here, the prior judgment is itself an integral element of the § 1983 claim, that judgment presents no absolute barrier to the later assertion of the federal cause of action in federal court.

Not giving claim preclusive effect to a prior state court judgment constituting part of the factual matrix comprising a § 1983 claim flows logically and legally from basic principles underlying claim preclusion. As this Court recognized in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955), a prior judgment "cannot be given the effect of extinguishing claims which did not even exist and which could not possibly have been sued upon in the previous case." Here, Gregory's federal § 1983 claims did not mature until *after* the Texas judg-

ment became final. *See, e.g., Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146-1147 (9th Cir. 1986) (§ 1983 claim based on deprivation of Due Process does not accrue until relevant governmental authorities make a final decision depriving litigant of Due Process); *Battieste v. Baton Rouge*, 732 F.2d 439, 440 (5th Cir. (1984) (District Court determined that § 1983 action did not arise until conviction was final); *Downton v. Vandemark*, 571 F. Supp. 40, 47 (N.D. Ohio 1983) (§ 1983 claim alleging deprivation of right to effective counsel did not accrue until District Court's judgment was final). Texas law also provides that a prior judgment does not preclude a later-arising claim, even where the subsequent claim relates to the subject matter of the prior action. *See, e.g., Greater Houston Bank v. Conte*, 666 S.W.2d 296, 300 (Tex. Civ. App.—Houston 1984); *Texas Employers' Ins. Assoc. v. Tobias*, 669 S.W.2d 742, 744 (Tex. Civ. App.—San Antonio 1983, *writ ref. n.r.e.*).

Gregory's § 1983 claims did not exist and could not have been raised prior to entry of the final Texas judgment. Those claims were not a defense to Lytton's false undue influence charges because the settlement agreement had not yet been entered as a judgment of the Court. Moreover, Gregory's federal claims were not ripe for adjudication until after the judgment was made final and binding against Gregory. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986); *Suburban Trails, Inc. v. New Jersey Transit Corp.*, 800 F.2d 361 (3rd Cir. 1986).

By giving claim preclusive effect to the prior judgment which comprises part of the federal claim, the Fifth Circuit effectively carved out an unwarranted exception to § 1983. In adopting § 1983, Congress clearly intended the statute's proscriptions to be applicable to all Constitutional deprivations by persons acting under

color of state law, even those accomplished through state judicial proceedings. *Tower v. Glover*, 467 U.S. 914 (1984); *Mitchum v. Foster*, 407 U.S. 225 (1972); *see McWilliams v. McWilliams*, 804 F.2d 1400, 1403 (5th Cir. 1986). Transforming the very judgment which causes the deprivation into an absolute bar unnecessarily exempts the fruits of state judicial action from the reach of § 1983 and emasculates the "grave congressional concern that the state courts have been deficient in protecting federal rights." *Haring v. Prosise*, 462 U.S. 306, 323 (1983) (quoting from *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980)). Neither 28 U.S.C. § 1738, nor principles of claim preclusion mandate the creation of a special class of state action exempt from prosecution under § 1983 merely because the deprivation of Constitutional rights is accomplished in part through entry of a judgment by a state court. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (§ 1983 is a remedy for unconstitutional state action, whether it be executive, legislative or judicial).

The Fifth Circuit Court of Appeals ignored the unusual factual circumstances of this case, the implications of this Court's decision in *Tower*, and the unique federal claims asserted by Gregory. Instead, it focused myopically on the prior state court judgment and mechanically applied principles of claim preclusion without proper analysis of the factual or legal bases for Gregory's later-arising § 1983 cause of action. Accordingly, Gregory respectfully requests that this Court grant *certiorari*, review the Fifth Circuit's erroneous decision and decide the issue of first impression presented by this case.

II. The Writ Should Be Granted To Resolve A Split Between The Federal Circuit Courts of Appeals

In affirming the dismissal of Gregory's federal complaint, the Fifth Circuit refused to examine the gross unfairness, inequalities and inadequacies of the Texas

state court proceedings. Indeed, the Fifth Circuit held such considerations irrelevant:

> Whatever the label placed on the proceeding in which Brother Leo's motion to set aside the interlocutory judgment was decided, *and regardless of our view of its constitutional sufficiency*, if we are bound by the state court decisions . . . we must affirm the district court's dismissal.

(App. A-8a) (emphasis added). *See McWilliams v. McWilliams*, 804 F.2d 1400 (5th Cir. 1986) where the Fifth Circuit similarly engaged in rote-like application of claim preclusion doctrines to bar a § 1983 action.

By contrast, the Tenth and Seventh Circuit Courts of Appeals expressly eschew the Fifth Circuit's mechanical approach and instead engage in a more sophisticated and flexible analysis specifically designed to reconcile the potential conflict between Congress' strong policy of remedying deprivations of Constitutional rights under 42 U.S.C. § 1983, and giving full, faith and credit to prior state court judgments under 28 U.S.C. § 1738. In a number of recent decisions, the Tenth Circuit refused to give claim preclusive effect to prior state court judgments in § 1983 cases where it was not clearly established that the plaintiff had a full and fair opportunity to litigate his claims, *Thournir v. Meyer*, 803 F.2d 1093 (10th Cir. 1986); *Scroggins v. Kansas, Dept. of Human Resources, Div. of CETA*, 802 F.2d 1289 (10th Cir. 1986) [hereinafter cited as "*Scroggins*"], or the Court doubted the quality, extensiveness or fairness of the prior state court procedures, *Morgan v. City of Rawlins*, 792 F.2d 975 (10th Cir. 1986). The Seventh Circuit has also held that a prior state court judgment is not entitled to claim preclusive effect where the prior state proceedings did not afford the federal plaintiff the requisite Due Process mandated by the Constitution. *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985). *See also Boileau v. Bethleham Steel Corp.*, 730 F.2d 929 (3rd Cir.), *cert. denied*,

469 U.S. 871 (1984); Smith, *Full, Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59, 106-123 (1984) (where the author advocates persuasively for limited exceptions to claim preclusion under circumstances similar to those presented by this case).

The Fifth Circuit's opinion in this case, and its decision in *McWilliams v. McWilliams*, 804 F.2d 1400 (5th Cir. 1986), cannot be reconciled with the Tenth Circuit's decisions in *Thournir*, *Scroggins* and *Morgan*, or the Seventh Circuit's opinion in *Jones*. Indeed, had Gregory commenced this action in the Tenth or Seventh Circuit, the prior Texas judgment would not have been given claim preclusive effect and Gregory's complaint would not have been dismissed.

Gregory was deprived of a full or fair opportunity to litigate his claims in the Texas state courts on at least five (5) separate occasions. First, when the respondents, knowing of Gregory's lack of consent and his refusal to agree to the settlement, procured Gregory's signature under extreme duress and coercion, caused his conditional cover letter to be separated from the settlement agreement, procured Keating's telegram and then secretly held a meeting of the Foundation at which they ousted Gregory pursuant to a patently invalid "proxy" allegedly given to Jewett (not Gregory's attorney) by Gregory's religious superior. Second, when the respondents purposefully excluded Gregory and his counsel from the 1964 hearing and caused the Texas District Court to enter a settlement agreement they knew to be invalid as a court-ordered interlocutory judgment. Third, when the Texas courts dismissed Gregory's Bill of Review as premature without reaching the merits. Fourth, when the Texas District Court refused Gregory's timely request for a trial and instead unexpectedly held a brief and one-sided evidentiary hearing on September 21, 1979. Fifth, when the Texas Court of Civil Appeals made new law and applied it retroactively to preclude Gregory's

1979 challenge to the court-ordered settlement because he had not voiced his objections before the interlocutory judgment entered in 1964.

Gregory also was not afforded a full or fair opportunity to litigate the Constitutional claims he asserts in this case. First, Gregory's Constitutional claims were not ripe until after the Texas judgment became final (*see* pages 15-16, *supra*). Second, at the time Gregory appealed the entry of the final judgment, Texas law under *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (Tex. 1951) clearly provided that a settlement agreement could not be entered as a consent judgment if one of the parties notified the court of his lack of consent before entry of final judgment. It is undisputed that Gregory complied with the requirements of *Burnaman*. The Texas Court of Civil Appeals, however, changed Texas law and whipsawed Gregory with a legal "Catch 22" the effect of which when applied to this case resulted in a holding that, once the respondents unlawfully prevented Gregory from being present at the hearing in 1964, Texas law precluded Gregory from thereafter challenging the judgment. In short, the change in Texas law rendered Gregory's first challenge too early, *Gregory v. Lytton*, *supra* (App. F-55a-64a), and his subsequent challenge too late, *Gregory v. White*, *supra* (App. C-15a-20a), thereby depriving Gregory of any meaningful opportunity to raise his Due Process claims. Where, as here, the state court proceedings place a litigant between Scylla and Charybdis, the resulting judgment is not entitled to claim preclusion. *Scroggins*, *supra*, 802 F.2d 1289, 1292 (10th Cir. 1986).

Moreover, the prior Texas litigation was fundamentally unfair and lacking in quality or extensiveness. At every stage in the Texas proceedings, Gregory was stymied from receiving a full or fair day in court. He was prevented from litigating his defenses to Lytton's false undue influence charges by the respondents procuring his signature on a "settlement agreement" through coercion

and duress, causing Gregory's conditional cover letter to be divorced from the document and then surreptitiously holding a meeting of the Foundation and using a telegram from Gregory's religious superior as Gregory's proxy to confirm the settlement, elect the respondents as new members and tender Gregory's resignation from the Foundation. Subsequently, the respondents purposefully excluded Gregory from the 1964 hearing to ensure that their scheme would not be exposed before judgment entered. The Texas courts then dismissed Gregory's first challenge to the interlocutory judgment as premature and his subsequent challenge to entry of the final judgment as untimely. The inherent unfairness of the entire proceedings mandates that Due Process principles override any preclusive effect which arguably may be ascribed to the resulting judgment under 28 U.S.C. § 1738. *See Scroggins, supra*, 802 F.2d at 1291; *Jones v. City of Alton, supra*, 757 F.2d at 884; *Boileau v. Bethleham Steel Corp., supra*, 730 F.2d at 935.

The Tenth and Seventh Circuits' flexible claim preclusion analysis is consistent with prior decisions of this Court, whereas the Fifth Circuit's rote application of broad preclusion rules is in direct conflict. This Court has consistently held that state preclusion rules do not bar a plaintiff's § 1983 action where the plaintiff has not had a full and fair opportunity to litigate his claims in state court. *Haring v. Prosise*, 462 U.S. 306, 313-314, 317-318 (1983); *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 (1982). This Court has also held that, even in the face of state law preclusion, reexamination of the issues by a federal court nevertheless is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in the prior action. *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979). *See Castorr v. Brundage*, 459 U.S. 928, 929 n.2 (1982) (the character of the earlier state proceedings and the character of the federal Constitutional claim affect the appli-

cability of claim preclusion in § 1938 actions) (Stevens, J.), *denying cert. to*, 674 F.2d 531 (6th Cir. 1982).

Here, there was a concerted, systemic failure to afford Gregory a full or fair opportunity to litigate either his defenses to Lytton's false charges of undue influence, the validity of the judgment incorporating the invalid settlement agreement or the federal claims raised in this case. Moreover, there exist serious doubts about the quality, extensiveness and fairness of the procedures orchestrated by the respondents in the prior Texas action. At a minimum, Gregory's pleadings raise genuine issues of material fact on the fairness, quality and extensiveness issues which cannot be resolved on a motion to dismiss under Fed. R. Civ. P. 12 or even on a motion for summary judgment under Fed. R. Civ. P. 56.

The Fifth Circuit clearly erred in affirming the District Court's summary dismissal of Gregory's complaint under Fed. R. Civ. P. 12(b). Its opinion and method of analysis is diametrically opposed to recent and better-reasoned decisions of the Tenth and Seventh Circuits and conflicts with prior decisions of this Court. Protections of fundamental Constitutional rights under § 1983 should not turn on such procedural niceties as whether jurisdiction and venue can be acquired in the Tenth or Seventh, rather than the Fifth, Circuit Court of Appeals. Accordingly, this Court should grant *certiorari* to review the Fifth Circuit's error and resolve the split between the Fifth, and Tenth and Seventh, Circuit Courts of Appeals.

III. The Writ Should Be Granted Because This Case Is Of Great Public Interest

This case has peaked the interests of attorneys, businessmen and religious persons. Two lengthy articles on the case appeared in the *Wall Street Journal* on October 8 and 9, 1986. The Bishop of Corpus Christi published a lengthy rejoinder in a special supplement to the October 17, 1986 issue of the *South Texas Catholic*. The *National*

Catholic Reporter published a three part series on the case in its February 6, 13 and 20, 1987 issues.

These articles and the issues raised in this case have stimulated serious debate amongst laymen, religious persons and lawyers. Much of that debate, however, reflects a disturbing lack of confidence that our legal system or the United States Constitution protects citizens against injustices caused by legal technicalities. As stated in an editorial in the February 20, 1987 issue of the *National Catholic Reporter*:

> Those who now hold the moneybags say [Gregory] had "his day in court" many times in the past 25 years. The record shows his case was never heard on the merits. When his most recent suit was rejected last month [by the Fifth Circuit], the judgment was based entirely on legal technicalities. That was the law speaking, but it was not speaking about justice—it was speaking about the law. (Vol. 23, No. 18, p. 12, col. 1).

This Court should hear this case to rule definitively on the difficult legal issues over which theologians, laymen, attorneys, and even the Federal Circuit Courts of Appeals, disagree. A uniform rule and method of analysis should be pronounced to avoid unnecessary and counterproductive forum shopping in cases where a prior state court judgment could be raised as a defense to a § 1983 claim. Review is especially important to remedy the perceptions of laymen and religious persons that the state and federal courts can be used by the unscrupulous as instruments of injustice. Gregory respectfully suggests that a thorough and comprehensive review by this Court can and will change those perceptions and re-instill confidence that the Due Process Clause "protects civil litigants who seek recourse in the courts," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1952), and guarantees "to all individuals a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

CONCLUSION

For the reasons discussed above, a writ of *certiorari* should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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